GIAN SINGH & CO. v. DEVRAJ NAHAR & ORS.

[P.C. (Lord Morris of Borth-y-Gest, Lord Pearce and Lord Upjohn) January 12, 1965]

[Privy Council Appeal No. 29 of 1963]

Landlord and Tenant — Covenant not to assign — Tenant carrying on business in demised premises with other partners — No specific assignment of tenancy — Whether tenant in breach of covenant — Control of Rent Ordinance, 1956.

The appellants the chief tenants of shop premises in Kuala Lumpur sought to recover possession of the premises which they had sublet to the first respondent on the ground that first respondent by taking two partners into his business and entering into a partnership deed with them had broken his covenant not to assign or sublet the premises without the landlords' written consent. The partnership deed contained no specific reference to the tenancy but stated that the business would be carried on on the premises or such other place or places as the partners may from time to time agree upon. At the trial it was held that the respondent had committed a breach of the covenant not to assign and an order for possession was made against the respondents. On appeal the Court of Appeal held that there had been no assignment or subletting and discharged the order for possession ([1963] M.L.J. 173). The appellants appealed to the Privy Council.

Held: the deed of partnership in this case did not constitute an assignment of the premises. Property used for partnership purposes are not necessarily partnership property and therefore the respondents should not be ordered to vacate the premises.

Cases referred to:—

(1) *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. 198.

(2) *Chaplin* v. *Smith* [1926] 1 K.B. 198.

PRIVY COUNCIL.

E. F. N. Gratiaen, Q.C. and *G. Avgherinos* for the appellants.

L. A. Blundell, Q.C. and *Frank Whitworth* for the respondents.

The judgment of their Lordships of the Privy Council was delivered by,

Lord Pearce: The appellants (referred to as "the landlords") are the chief tenants of certain shop premises in Kuala Lumpur. In 1934 they sub-let those premises on an oral monthly tenancy to the first respondent's father who there carried on the business of a dealer in sports goods under the style of Nahar & Co. At the end of 1955 the father retired owing to ill-health. The business was then taken over by the first respondent (referred to as "the tenant") and thereafter by novation he occupied the premises on the same terms as his father had done.

In March 1958 the tenant took two partners into his business. The landlords then brought this action on the ground that by assigning to the partnership the tenant had broken his covenant not to assign or sublet the premises without the landlord's written consent which they had admittedly refused to give. They joined as co-defendants the second and third respondents, who are the tenant's two partners.

The tenancy is protected by the Control of Rent Ordinance No. 2 of 1956, but no question arises on the terms of that Ordinance. It is common ground that a good notice was given by the landlords terminating the common law tenancy; that the tenant then became a statutory tenant; and that under the Ordinance no order for possession could be made against him unless he was in breach of covenant. If however he was in breach, the landlords are entitled to an order.

At the trial the tenant contended that there was no covenant not to assign or sublet and that, if there was, he had not committed any breach of it. The trial judge after hearing the oral evidence and considering the deed of partnership concluded that there was a covenant against assigning or subletting and that the tenant had broken it by entering into the partnership deed. He relied on clause 2 of the partnership deed as constituting an assignment. Accordingly he made an order for possession against the tenant and the two other respondents.

They then appealed successfully to the Court of Appeal on the ground that there had been no breach of the covenant either under clause 2 or under any clause of the partnership deed. There was also among the grounds of appeal some complaint of the judge's finding that there was a covenant against assignment or subletting, but that does not appear to have figured largely or at all in the argument. The Court of Appeal did not deal with it, but they took the view that there had been no assignment or subletting, and discharged the order for possession. The landlords now appeal.

Mr. Gratiaen for the landlords has not felt able to rely on clause 2 of the partnership agreement which was the foundation of the learned trial judge's decision, but he contends that the plain implication of clauses 5 and 6 supported by the behaviour of the respondents and some admissions of the tenant in cross-examination is that there has been an assignment by the tenant to the partnership.

The partnership deed witnesses that the three respondents "hereby mutually agree to become partners in the business of Nahar & Co. now carried on by 'the tenant' alone at No. 11 Mountbatten Road, Kuala Lumpur for the period and on the terms hereinafter expressed."

The relevant terms are as follows:—

"5. Subject to the provisions of these presents the partners shall be entitled to the capital and property for the time being of the partnership and to the goodwill of the business in equal shares.

6. The capital of the partnership shall consist of the net value of the stock-in-trade book debts and other assets of the business of 'Nahar & Co.' heretofore carried on by Devraj at No. 11 Mountbatten Road, Kuala Lumpur

less the outstanding liabilities of that business and for purposes of computation the said assets shall be taken to be of the net value of $30,000 which shall be credited to the three partners equally as their share of capital."

The deed contains no specific reference to the tenancy, nor any other indication as to what rights or duties any party shall have with regard to it.

For the landlords it is argued that the tenancy was one of the "other assets of the business of Nahar & Co." under clause 6, that the partners were under clause 5 "entitled to the capital and property for the time being of the partnership . . . in equal shares" and that the joint effect of the two clauses was to divest the tenant of his tenancy and to vest it in the partners, thus constituting an assignment. In addition the tenant said in cross-examination "I know the premises were a valuable asset to (*sic*) my business. When I took the partners I did not retain a portion of the premises for myself and all the partners enjoyed the use of the entire premises." Moreover the advocate who conducted the case devoted much argument to the point that an assignment of two-thirds of the tenant's interest was not a breach of a covenant to assign — apparently on the assumption that there had been some such assignment. Furthermore the solicitor for all three respondents tried hard to resist rent receipts offered by the landlords in the name of the tenant personally "as proprietor of Nahar & Co." and to force him to give receipts in the name of "Nahar & Co.", that being the form in which they had been issued while the tenant was the sole proprietor.

In their Lordships' view, however, these supplemental considerations add nothing to the deed. The tenant could not but admit that these excellent premises were an asset to the business, that does not bear on the question whether the tenancy was an asset of the business which was transferred to the partnership. And the fact that the partners enjoyed the use of the entire premises was an obvious consequence of the deed but it does not decide the point in issue. The respondents' advocate never made any admission that there was an assignment and the judge's notes of the submissions are brief. The efforts of the respondents to secure receipts in the name of Nahar & Co. after the partnership had been formed might well support an inference against there having been any assignment. The tenant certainly, and the other respondents probably, knew that the landlords had for some time past been maintaining a clear refusal of permission to any assignment. And it could well be that they considered it too dangerous to commit themselves to anything that could constitute an assignment and might jeopardise the tenancy, and preferred rather to wait and see whether it was possible for the partnership by some manoeuvre to insinuate itself or infiltrate into the tenancy. The requests for receipts made out to Nahar & Co. could be such a manoeuvre, and, if granted, might have succeeded in that object. Be that as it may, their Lordships are of opinion that it is to the deed that the landlords must look if they are to establish an assignment.

Hill J. A. in the Court of Appeal aptly quoted from *Lindley* on Partnership 12th Ed. p. 365 under the heading "Property used for partnership purposes not necessarily partnership property" the following words "Again it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm or without any lease at all." He also relied on *Peebles* v. *Crosthwaite* [1] and *Chaplin* v. *Smith* [2] as establishing that a lessee who retains possession does not commit a breach of the covenant against parting with possession by allowing other people to use the premises.

When one person is proprietor of a business the question which assets are included as assets of the business may not always be clear. There is no certainty that the tenant regarded his personal tenancy, albeit used by him as premises for carrying on the business, as an asset of the business, which passed with the business. And if, under the deed, the tenancy was being assigned to the partnership, one would certainly expect to find clearer provision with regard to it. The tenancy might have been dealt with by the tenant giving to his partners a licence to trade with him there or by his constituting himself a trustee for the partnership, or merely by giving the partners no express rights at all. From a practical point of view the incoming partners were, even if no arrangement at all was made about the premises, adequately protected by clause 4 which provided that the business should be carried on at the premises "or at such other place or places as the partners may from time to time agree upon". In the face of that it is difficult to see how the incoming partners could be ousted from the premises by the tenant. And they may well have been content to leave the tenancy vested in the tenant rather than play with fire by seeking an assignment.

But whatever be the motives that lay behind the deed, their Lordships cannot construe it as constituting an assignment. They are therefore in agreement with the Court of Appeal that there was no assignment and that the tenant should not have been ordered to vacate the premises.

Their Lordships will therefore report to the Head of Malaysia their opinion that the appeal

should be dismissed and that the appellants should pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Graham Page & Co.; Bukring & Davis.*

KUNG SIANG NG v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.C.) January 13, 1965]

[Sibu — Criminal Appeal No. CA /15/64]

Shipping — Collisions at sea — Interpretation Ordinance, (Cap. 1), s. 42 — Merchant Shipping Ordinance, 1960, s. 249 — International Regulations for Preventing Collisions at Sea, 1948 — Misdemeanour — Jurisdiction — Triable in district court — Malaysia Act, 1963, s. 73.

Criminal Procedure — Accused not represented — Duty of magistrate.

The appellant was convicted in the police court of offences under the International Regulations for Preventing Collisions at Sea, punishable under section 42 of the Interpretation Ordinance. He appealed on the ground that the trial was void and illegal.

Held: as the offence is a misdemeanour under the provisions of section 419 of the Merchant Shipping Act, 1894, it is only triable under the provisions of section 42 of the Interpretation Ordinance read with section 249 of the Merchant Shipping Ordinance by a district court; therefore the trial was a nullity and the conviction must be set aside.

Per Curiam: When an accused person is not represented by advocate magistrates should not overlook the provisions of section 202 of the Criminal Procedure Code (Sarawak Cap. 58). A note should be made if the said section 202 is complied with.

CRIMINAL APPEAL.

George Seah Kim Seng for the appellant.

D. M. Goodbody (Deputy Public Prosecutor) for the respondent.

Lee Hun Hoe J.C.: I allowed the appeal and stated that I would give my reason in writing. This I now do. Appellant was charged before the police court at Kanowit as follows:—

"1st charge

That you, on or about the 13th May, 1964 at about 0500 hours, at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel, committed an offence under rule 18 of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance.

2nd charge

That you, on or about the 13th May, 1964 at about 0500 hours at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel committed an offence under rule 22 of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance.

3rd charge

That you, on or about the 13th May, 1964 at about 0500 hours, at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel, committed an offence under rule 25(a) of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance."

He was acquitted of the 2nd charge but was convicted of the other two charges and fined a total of $90. Being dissatisfied with the decision he appealed. There were four grounds of appeal. The first ground was that the trial was void and illegal. For reasons which will become obvious it is not necessary for me to deal with the other three grounds since I allowed the appeal on the first ground.

Before I deal with the appeal itself I would like to make certain observations. I agree with both Mr. Seah for the appellant and Mr. Goodbody for the respondent that the charges were badly framed. Particulars were not sufficiently given in any of the charges. As a result the appellant probably did not know clearly what case he had to meet. Further these charges are novel and one would have thought that the authorities concerned would take the trouble to seek for legal advice before taking any action. The merchant shipping legislation is ever so complex and fraught with technicalities.

Although in the case docket there is a memorandum from the marine officer, Sibu, to the Superintendent of Constabulary, Sibu, purporting to authorise the latter to prosecute under section 248 of the Merchant Shipping Ordinance there is nothing on the record of the proceedings to indicate that the memorandum had been produced and put in or inspected by the trial magistrate during the trial. At any rate under the said section 248 a person can only be charged on the complaint of the director of marine or any person authorised in writing in that behalf. The said marine officer may be so authorised. But there is nothing in the record to show that he was so authorised. In my view the memorandum is not worth the paper it was written on unless the written authorisation given to the said marine officer was also produced to the court.

When an accused person is not represented by advocate magistrates should not overlook the provisions of section 202 of the Criminal Procedure Code. A note should be made if the said section 202 is complied with. There is nothing in the record to indicate that the provisions of the said section 202 had been complied with.

I now come to the appeal itself. Mr. Seah submitted that the police court had no jurisdiction to hear the case. This submission was conceded by Mr. Goodbody who decided not to argue the remaining grounds when I indicated that I would allow the appeal on the first ground and that I did not think it fair to express my opinion on matters which might prejudice the lower court should there be a fresh prosecution.

Among other provisions saved from repeal